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A MINISTRY OF JUSTICE

THE courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed. Time was when the remedial agencies, though inadequate, were at least in our own hands. Fiction and equity were tools which we could apply and fashion for ourselves. The artifice was clumsy, but the clumsiness was in some measure atoned for by the skill of the artificer. Legislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool, but has taken the use out of our own hands and put it in the hands of others. The means of rescue are near for the worker in the mine. Little will the means avail unless lines of communication are established between the miner and his rescuer. We must have a courier who will carry the tidings of distress to those who are there to save when signals reach their ears. To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic

advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them.

This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged. The thought is not a new one. Among our own scholars, it has been developed by Dean Pound with fertility and power.[1] Others before him, as he reminds us, had seen the need, and urged it. Bentham made provision for such a ministry in his draft of a Constitutional Code.[2] Lord Westbury renewed the plea.[3] Only recently, Lord Haldane has brought it to the fore again.[4] "There is no functionary at present who can properly be called a minister responsible for the subject of Justice."[5] "We are impressed by the representations made by men of great experience, such as the President of the Incorporated Law Society, as to the difficulty of getting the attention of the government to legal reform, and as to the want of contact between those who are responsible for the administration of the work of the Commercial Courts and the mercantile community, and by the evidence adduced that the latter are, in consequence and progressively, withdrawing their disputes from the jurisdiction of the Courts."[6] In countries of continental Europe, the project has passed into the realm of settled practice. Apart from these precedents and without thought of them, the need of such a ministry, of some one to observe and classify and criticize and report, has been driven home to me with steadily growing force through my own work in an appellate court. I have seen a body of judges applying a system of case law, with powers of innovation cabined and confined. The main lines are fixed by precedents. New lines may, indeed, be run, new courses followed, when precedents are lacking. Even then, distance and direction are guided by mingled considerations of

[1] Pound, "Juristic Problems of National Progress," 22 AM. J. OF SOCIOLOGY, 721, 729, 731 (May, 1917); Pound, "Anachronisms in Law," 3 J. AM. JUDICATURE SOC., 142, 146 (February, 1920).

[2] WORKS, IX, 597–612.

[3] 1 NASH, LIFE OF LORD WESTBURY, 191, quoted by Pound, *supra*.

[4] Report of Lord Haldane's Committee on the Machinery of Government (1918).

[5] *Ibid.*, p. 63.

[6] *Ibid.*, p. 64.

logic and analogy and history and tradition which moderate and temper the promptings of policy and justice. I say this, not to criticize, but merely to describe. I have seen another body, a legislature, free from these restraints, its powers of innovation adequate to any need, preoccupied, however, with many issues more clamorous than those of courts, viewing with hasty and partial glimpses the things that should be viewed both steadily and whole. I have contrasted the quick response whenever the interest affected by a ruling untoward in results had some accredited representative, especially some public officer, through whom its needs were rendered vocal. A case involving, let us say, the construction of the Workmen's Compensation Law, exhibits a defect in the statutory scheme. We find the Attorney General at once before the legislature with the request for an amendment. We cannot make a decision construing the tax law or otherwise affecting the finances of the state without inviting like results. That is because in these departments of the law, there is a public officer whose duty prompts him to criticism and action. Seeing these things, I have marveled and lamented that the great fields of private law, where justice is distributed between man and man, should be left without a caretaker. A word would bring relief. There is nobody to speak it.

For there are times when deliverance, if we are to have it — at least, if we are to have it with reasonable speed — must come to us, not from within, but from without. Those who know best the nature of the judicial process, know best how easy it is to arrive at an impasse. Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.

Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events,

whether really too late or not, so many judges think it is that the result is the same as if it were. Distinctions may, indeed, supply for a brief distance an avenue of escape. The point is at length reached when their power is exhausted. All the usual devices of competitive analogies have finally been employed without avail. The ugly or antiquated or unjust rule is there. It will not budge unless uprooted. Execration is abundant, but execration, if followed by submission, is devoid of motive power. There is need of a fresh start; and nothing short of a statute, unless it be the erosive work of years, will supply the missing energy. But the evil of injustice and anachronism is not limited to cases where the judicial process, unaided, is incompetent to gain the mastery. Mastery, even when attained, is the outcome of a constant struggle in which logic and symmetry are sacrificed at times to equity and justice. The gain may justify the sacrifice; yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset. There is a loss too of simplicity and directness, an increasing aspect of unreality, of something artificial and fictitious, when judges mask a change of substance, or gloss over its importance, by the suggestion of a consistency that is merely verbal and scholastic. Even when these evils are surmounted, a struggle, of which the outcome is long doubtful, is still the price of triumph. The result is to subject the courts and the judicial process to a strain as needless as it is wearing. The machinery is driven to the breaking point; yet we permit ourselves to be surprised that at times there is a break. Is it not an extraordinary omission that no one is charged with the duty to watch machinery or output, and to notify the master of the works when there is need of replacement or repair?

In all this, I have no thought to paint the failings of our law in lurid colors of detraction. I have little doubt that its body is for the most part sound and pure. Not even its most zealous advocate, however, will assert that it is perfect. I do not seek to paralyze the inward forces, the "indwelling and creative" energies,[7] that make for its development and growth. My wish is rather to release them, to give them room and outlet for healthy and unhampered action. The statute that will do this, first in one field and then in others, is something different from a code, though, as statute follows statute, the material may be given from which in time, a

[7] 2 BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 609.

code will come. Codification is, in the main, restatement. What we need, when we have gone astray, is change. Codification is a slow and toilsome process, which, if hurried, is destructive. What we need is some relief that will not wait upon the lagging years. Indeed, a code, if completed, would not dispense wit mediation between legislature and judges, for code is followed by commentary and commentary by revision, and thus the task is never done. "As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." [8] Something less ambitious, in any event, is the requirement of the hour. Legislation is needed, not to repress the forces through which judge-made law develops, but to stimulate and free them. Often a dozen lines or less will be enough for our deliverance. The rule that is to emancipate is not to imprison in particulars. It is to speak the language of general principles, which, once declared, will be developed and expanded as analogy and custom and utility and justice, when weighed by judges in the balance, may prescribe the mode of application and the limits of extension. The judicial process is to be set in motion again, but with a new point of departure, a new impetus and direction. In breaking one set of shackles, we are not to substitute another. We are to set the judges free.

I have spoken in generalities, but instances will leap to view. There are fields, known to us all, where the workers in the law are hampered by rules that are outworn and unjust. How many judges, if they felt free to change the ancient rule, would be ready to hold to-day that a contract under seal may not be modified or discharged by another and later agreement resting in parol? [9] How many would hold that a deed, if it is to be the subject of escrow, must be delivered to a third person, and not to the grantee? [10] How many would hold that a surety is released, irrespective of resulting damage, if by agreement between principal and creditor the time of payment of the debt is extended for a single day? [11] How many would hold that a release of one joint tortfeasor is a release also of the others? How many would not prefer, instead

[8] ARISTOTLE, POLITICS, Bk. II (Jowett's translation).

[9] 3 WILLISTON, CONTRACTS, §§ 1834–1837; Harris *v.* Shorall, 230 N. Y. 343 (1921).

[10] Blewitt *v.* Boorum, 142 N. Y. 357, 37 N. E. 119 (1894).

[11] N. Y. Life Ins. Co. *v.* Casey, 178 N. Y. 381, 70 N. E. 916 (1904).

of drawing some unreal distinction between releases under seal and covenants not to sue,[12] to extirpate, root and branch, a rule which is to-day an incumbrance and a snare? How long would Pinnel's case[13] survive if its antiquity were not supposed to command the tribute of respect? How long would Dumpor's case[14] maintain a ghostly and disquieting existence in the ancient byways of the law?

I have chosen extreme illustrations as most likely to command assent. I do not say that judges are without competence to effect some changes of that kind themselves. The inquiry, if pursued, would bring us into a field of controversy which it is unnecessary to enter. Whatever the limit of power, the fact stares us in the face that changes are not made. But short of these extreme illustrations are others, less glaring and insistent, where speedy change is hopeless unless effected from without. Sometimes the inroads upon justice are subtle and insidious. A spirit or a tendency, revealing itself in a multitude of little things, is the evil to be remedied. No one of its manifestations is enough, when viewed alone, to spur the conscience to revolt. The mischief is the work of a long series of encroachments. Examples are many in the law of practice and procedure.[15] At other times, the rule, though wrong, has become the cornerstone of past transactions. Men have accepted it as law, and have acted on the faith of it. At least, the possibility that some have done so, makes change unjust, if it were practicable, without saving vested rights. Illustrations again may be found in many fields. A rule for the construction of wills established a presumption that a gift to issue is to be divided, not *per stirpes*, but *per capita*.[16] The courts denounced and distinguished, but were unwilling to abandon.[17] In New York, a statute has at last

[12] Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133 (1903); Walsh *v.* N. Y. Central R. R. Co., 204 N. Y. 58, 97 N. E. 408 (1912); *cf.* 21 COLUMBIA L. REV. 491.

[13] 5 Coke, 117; *cf.* Jaffray *v.* Davis, 124 N. Y. 164, 167, 26 N. E. 351 (1891); Frye *v.* Hubbell, 74 N. H. 358, 68 Atl. 325 (1907); 1 WILLISTON, CONTRACTS, § 121; ANSON, CONTRACTS, Corbin's ed., p. 137; Ferson, "The Rule in Foakes *v.* Beer," 31 YALE L. J. 15.

[14] 2 Coke, 119.

[15] In jurisdictions where procedure is governed by rules of court, recommendations of the ministry affecting the subject-matter of the rules may be submitted to the judges.

[16] I state the law in New York and in many other jurisdictions. There are jurisdictions where the rule is different.

[17] Petry *v.* Petry, 186 App. Div. 738, 175 N. Y. Supp. 30 (1919), 227 N. Y. 621, 125 N. E. 924 (1919); Matter of Durant, 231 N. Y. 41, 131 N. E. 562 (1921).

released us from our bonds,[18] and we face the future unashamed. Still more common are the cases where the evil is less obvious, where there is room for difference of opinion, where some of the judges believe that the existing rules are right, at all events where there is no such shock to conscience that precedents will be abandoned, and what was right declared as wrong. At such times there is need of the detached observer, the skilful and impartial critic, who will view the field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule in its working, and not, as judges watch it, in its making, and who viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion.

I note at random, as they occur to me, some of the fields of law where the seeds of change, if sown, may be fruitful of results. Doubtless better instances can be chosen. My purpose is, not advocacy of one change or another, but the emphasis of illustration that is concrete and specific.

It is a rule in some jurisdictions that if A sends to B an order for goods, which C, as the successor to B's business, takes it on himself to fill, no action at the suit of C will lie either for the price or for the value, if A in accepting the goods and keeping them believed that they had been furnished to him by B, and this though C has acted without fraudulent intent.[19] I do not say that this is the rule everywhere. There are jurisdictions where the question is still an open one. Let me assume, however, a jurisdiction where the rule, as I have stated it, prevails, or even one where, because the question is unsettled, there is a chance that it may prevail. A field would seem to be open for the declaration by the lawmakers of a rule less in accord, perhaps, with the demands of a "jurisprudence of conceptions," [20] but more in accord with those of morality and justice. Many will prefer to turn to the principle laid down in the French Code Civil:

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[18] Decedent's Estate Law, § 47a; L. 1921, c. 379.

[19] Boulton *v.* Jones, 2 H. & N. 564 (1857); 1 WILLISTON, CONTRACTS, § 80; *cf.* Boston Ice Co. *v.* Potter, 123 Mass. 28 (1877); Kelly Asphalt Co. *v.* Barber Asphalt Paving Co., 211 N. Y. 68, 71, 105 N. E. 88 (1914).

[20] Pound, "Mechanical Jurisprudence," 8 COLUMBIA L. REV. 605, 608, 610; Hynes *v.* N. Y. Central R. R. Co., 231 N. Y. 229, 235, 131 N. E. 898 (1921).

"L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention." [21]

Much may be said for the view that in the absence of bad faith, there should be a remedy in quasi contract.[22]

It is a rule which has grown up in many jurisdictions and has become "a common ritual" [23] that municipal corporations are liable for the torts of employees if incidental to the performance or non-performance of corporate or proprietary duties, but not if incidental to the performance or non-performance of duties public or governmental. The dividing line is hard to draw.

"Building a drawbridge, maintaining a health department, or a charitable institution, confining and punishing criminals, assaults by policemen, operating an elevator in a city hall, driving an ambulance, sweeping and cleaning streets, have been held governmental acts. Sweeping and cleaning streets, street lighting, operating electric light plants, or water works, maintaining prisons, have been held private functions." [24]

The line of demarcation, though it were plainer, has at best a dubious correspondence with any dividing line of justice. The distinction has been questioned by the Supreme Court of the United States.[25] It has been rejected recently in Ohio.[26] In many jurisdictions, however, as, for example in New York, it is supported by precedent so inveterate that the chance of abandonment is small. I do not know how it would fare at the hands of a ministry of justice. Perhaps such a ministry would go farther, and would wipe out, not merely the exemption of municipalities, but the broader exemption of the state.[27] At least there is a field for inquiry, if not for action.

It is a rule of law that the driver of an automobile or other vehicle who fails to look or listen for trains when about to cross a railroad, is guilty of contributory negligence, in default, at least,

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[21] Code Civil, Art. 1110.

[22] ANSON, CONTRACTS (Corbin's edition), 31; KEENER, QUASI CONTRACTS, 358–360.

[23] 34 HARV. L. REV. 66.

[24] *Ibid.*, 67.

[25] Workman *v.* The Mayor, 179 U. S. 552, 574 (1900).

[26] Fowler *v.* City of Cleveland, 100 Ohio St. 158, 126 N. E. 72 (1919).

[27] Smith *v.* State, 227 N. Y. 405, 125 N. E. 841 (1920).

of special circumstances excusing the omission. I find no fault with that rule. It is reasonable and just. But the courts have in some jurisdictions gone farther. They have held that the same duty that rests upon the driver, rests also upon the passenger.[28] The friend whom I invite to ride with me in my car, and who occupies the rear seat beside me, while the car is in the care of my chauffeur, is charged with active vigilance to watch for tracks and trains, and is without a remedy if in the exuberance of jest or anecdote or reminiscence, he relies upon the vigilance of the driver to carry him in safety. I find it hard to imagine a rule more completely unrelated to the realities of life. Men situated as the guest in the case I have supposed, do not act in the way that this rule expects and requires them to act. In the first place, they would in almost every case make the situation worse if they did; they would add bewilderment and confusion by contributing multitude of counsel. In the second place, they rightly feel that, except in rare emergencies of danger known to them, but unknown to the driver, it is not their business to do anything. The law in charging them with such a duty has shaped its rules in disregard of the common standards of conduct, the every-day beliefs and practices, of the average man and woman whose behavior it assumes to regulate. We must take a fresh start. We must erect a standard of conduct that realists can accept as just. Other fields of the law of negligence may be resurveyed with equal profit. The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried.

Illustrations yet more obvious are at hand in the law of evidence. Some of its rules are so unwieldy that many of the simplest things

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[28] Read *v.* N. Y. C. & H. R. R. R. Co., 123 App. Div. 228, 107 N. Y. Supp. 1068 (1908); S. C., 165 App. Div. 910, 150 N. Y. Supp. 1108 (1914), aff'd., 219 N. Y. 660, 114 N. E. 1081 (1916); Noakes *v.* N. Y. C. & H. R. R. R. Co., 121 App. Div. 716, 106 N. Y. Supp. 522 (1907), 195 N. Y. 543, 88 N. E. 1126 (1909). For the true rule see Weidlich *v.* N. Y., N. H., & H. R. R., 93 Conn. 438, 106 Atl. 323 (1919); 31 YALE L. J. 101.

of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove. Witnesses speaking of their own knowledge must follow the subject-matter of the sale from its dispatch to its arrival. I have been told by members of the bar that claims of undoubted validity are often abandoned, if contested, because the withdrawal of the necessary witnesses from the activities of business involves an expense and disarrangement out of proportion to the gain. The difficulty would be lessened if entries in books of account were admissible as *prima facie* evidence upon proof that they were made in the usual course of business. Such a presumption would harmonize in the main with the teachings of experience. Certainly it would in certain lines of business, as, *e. g.*, that of banking, where irregularity of accounts is unquestionably the rare exception. Even the books of a bank are not admissible at present without wearisome preliminaries.[29] In England, the subject has for many years been regulated by statute.[30] Something should be done in our own country to mitigate the hardship. "The dead hand of the common-law rule . . . should no longer be applied to such cases as we have here." [31]

We are sometimes slow, I fear, while absorbed in the practice of our profession, to find inequity and hardship in rules that laymen view with indignation and surprise. One can understand why this is so. We learned the rules in youth when we were students in the law schools. We have seen them reiterated and applied as truths that are fundamental and almost axiomatic. We have sometimes even won our cases by invoking them. We end by accepting them without question as part of the existing order. They no longer have the vividness and shock of revelation and discovery. There is need of conscious effort, of introspective moods and moments, before their moral quality addresses itself to us with the same force as it does to others. This is at least one reason why the bar has at times been backward in the task of furthering reform. A recent study of the Carnegie Foundation for the Advancement of Teaching deals with the subject of training for the public profession of the law.[32] Dr. Pritchett says in his preface : [33]

[29] Ocean Bank *v.* Carll, 55 N. Y. 440 (1874); Bates *v.* Preble, 151 U. S. 149 (1894).
[30] 42 & 43 VICT. c. 11; STEPHEN, DIGEST OF THE LAW OF EVIDENCE, Art. 36.
[31] Rosen *v.* United States, 245 U. S. 467 (1918).
[32] Bulletin No. 15, Carnegie Foundation.
[33] *Ibid.*, p. xvii.

"There is a widespread impression in the public mind that the members of the legal profession have not, through their organizations, contributed either to the betterment of legal education or to the improvement of justice to that extent which society has the right to expect."

The Centennial Memorial Volume of Indiana University contains a paper by the Dean of the Harvard Law School on the Future of Legal Education.[34]

"So long as the leaders of the bar," he says,[35] "do nothing to make the materials of our legal tradition available for the needs of the twentieth century, and our legislative lawmakers, more zealous than well instructed in the work they have to do, continue to justify the words of the chronicler — 'the more they spake of law the more they did unlaw' — so long the public will seek refuge in specious projects of reforming the outward machinery of our legal order in the vain hope of curing its inward spirit."

Such reproaches are not uncommon. We do not need to consider either their justification or their causes. Enough for us that they exist. Our duty is to devise the agencies and stimulate the forces that will make them impossible hereafter.

What, then, is the remedy? Surely not to leave to fitful chance the things that method and system and science should order and adjust. Responsibility must be centered somewhere. The only doubt, it seems to me, is where. The attorneys-general, the law officers of the states, are overwhelmed with other duties. They hold their places by a tenure that has little continuity, or permanence. Many are able lawyers, but a task so delicate exacts the scholar and philosopher, and scholarship and philosophy find precarious and doubtful nurture in the contentions of the bar. Even those qualities, however, are inadequate unless reinforced by others. There must go with them experience of life and knowledge of affairs. No one man is likely to combine in himself attainments so diverse. We shall reach the best results if we lodge power in a group, where there may be interchange of views, and where different types of thought and training will have a chance to have their say. I do not forget, of course, the work that is done by Bar Associations, state and national, as well as local, and other voluntary bodies. The work has not risen to the needs of the occasion. Much of it has been

[34] Pound, "The Future of Legal Education," 259.

[35] *Ibid.*, 268.

critical rather than constructive. Even when constructive, it has been desultory and sporadic. No attempt has been made to cover with systematic and comprehensive vision the entire field of law. Discharge of such a task requires an expenditure of time and energy, a single-hearted consecration, not reasonably to be expected of men in active practice. It exacts, too, a scholarship and a habit of research not often to be found in those immersed in varied duties. Even if these objections were inadequate, the task ought not to be left to a number of voluntary committees, working at cross purposes. Recommendations would come with much greater authority, would command more general acquiescence on the part of legislative bodies, if those who made them were charged with the responsibilities of office. A single committee should be organized as a ministry of justice. Certain at least it is that we must come to some official agency unless the agencies that are voluntary give proof of their capacity and will to watch and warn and purge — unless the bar awakes to its opportunity and power.

How the committee should be constituted, is, of course, not of the essence of the project. My own notion is that the ministers should be not less than five in number. There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench; and there should be a representative or representatives of the bar.

Such a board would not only observe for itself the workings of the law as administered day by day. It would enlighten itself constantly through all available sources of guidance and instruction; through consultation with scholars; through study of the law reviews, the journals of social science, the publications of the learned generally; and through investigation of remedies and methods in other jurisdictions, foreign and domestic. A project was sketched not long ago by Professor John Bassett Moore, now judge of the International Court, for an Institute of Jurisprudence.[36] It was to do for law what the Rockefeller Institute is doing for medicine. Such an institute, if founded, would be at the service of the min-

[36] Report of Dean of Columbia University Law School for 1916.

isters. The Commonwealth Fund has established a Committee for Legal Research which is initiating studies in branches of jurisprudence where reform may be desirable. The results of its labors will be available for guidance. Professors in the universities are pointing the way daily to changes that will help. Professor Borchard of Yale by a series of articles on the Declaratory Judgment [37] gave the impetus to a movement which has brought us in many states a reform long waited for by the law.[38] Dean Stone of Columbia has disclosed inconsistencies and weaknesses in decisions that deal with the requirement of mutuality of remedy in cases of specific performance.[39] Professor Chafee in a recent article [40] has emphasized the need of reform in the remedy of interpleader. In the field of conflict of laws, Professor Lorenzen has shown disorder to the point of chaos in the rules that are supposed to regulate the validity and effect of contracts.[41] The archaic law of arbitration, amended not long ago in New York through the efforts of the Chamber of Commerce,[42] remains in its archaic state in many other jurisdictions, despite requests for change. A ministry of justice will be in a position to gather these and like recommendations together, and report where change is needed. Reforms that now get themselves made by chance or after long and vexatious agitation, will have the assurance of considerate and speedy hearing. Scattered and uncoördinated forces will have a rallying point and focus. System and method will be substituted for favor and caprice. Doubtless, there will be need to guard against the twin dangers of overzeal on the one hand and of inertia on the other — of the attempt to do too much and of the willingness to do too little. In the end, of course, the recommendations of the ministry will be recommendations and nothing more. The public will be informed of them. The bar and others interested will debate them. The legislature may reject them. But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged.

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[37] 28 YALE L. J. 1.
[38] 34 HARV. L. REV. 697.
[39] The "Mutuality" Rule in New York, 16 COLUMBIA L. REV. 443.
[40] "Modernizing Interpleader," 30 YALE L. J. 814.
[41] 30 YALE L. J. 565, 655; 31 *id.*, 53.
[42] Matter of Berkovitz, 230 N. Y. 261, 130 N. E. 288 (1921).

The time is ripe for betterment. "Le droit a ses époques," says Pascal in words which Professor Hazeltine has recently recalled to us. The law has "its epochs of ebb and flow."[43] One of the flood seasons is upon us. Men are insisting, as perhaps never before, that law shall be made true to its ideal of justice. Let us gather up the driftwood, and leave the waters pure.

Benjamin N. Cardozo.

NEW YORK CITY.

[43] H. D. Hazeltine, 1 CAMBRIDGE L. J. 1.